

1986

A. Lamar Hansen v. Cynthia Ann Hansen : Reply Brief

Utah Court of Appeals

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Recommended Citation

Reply Brief, *Hansen v. Hansen*, No. 860249 (Utah Court of Appeals, 1986).

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 860249

IN THE SUPREME COURT OF THE STATE OF UTAH

A. LAMAR HANSEN,)
Plaintiff and Appellant,)
vs.) CASE NO. 860249
CYNTHIA ANN HANSEN,) *Category #7*
Defendants and Respondents,)

REPLY BRIEF OF APPELLANT

APPEAL FROM THE JUDGMENT OF THE
SEVENTH JUDICIAL DISTRICT COURT IN AND FOR DUCHESNE COUNTY
HONORABLE RICHARD C. DAVIDSON, JUDGE

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COURT OF APPEALS

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IN THE SUPREME COURT OF THE STATE OF UTAH

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Defendant and Respondent.)

REPLY BRIEF OF APPELLANT

ARGUMENT

Appellant responds to the three (3) points of Respondent's brief as follows:

POINT I - CUSTODY

Respondent states in her brief (p. 1) that the parties' child was present during some episodes of physical abuse between the parties. No other such evidence was presented to the trial court. The testimony of the Respondent on that point should have been viewed by the trial court in light of Respondent's damaged credibility for truth and honesty. (See pp. 7-8 of Appellant's brief regarding Respondent's admission of:

- a. Making False Statement on a Loan Application;
- b. Employee Theft of Post Office Money Orders;
- c. Alteration of Check;

d. Breaking and Entering;

e. Unlawful Taking of Personal Property.)

No credible evidence was presented to show that the minor child had either been a witness to any physical acts between the mother and father or that the child had in any way been affected.

The trial court did not appear to consider the allegations of physical abuse to be of merit because the court granted the divorce on grounds of mental cruelty, not physical abuse.

Respondent's brief states (p. 3-4) that the trial court apparently utilized the factors set forth in Pusey v. Pusey, Utah, 40 Utah Adv. Rep. 7 (08/18/86) "as being important." However, the trial transcript is seriously silent as to what factors, if any, the trial court looked to other than its finding that the Respondent was the primary care-giving parent. Of critical importance to a determination of custody is the quality of care which the child receives, and can be expected to receive, from its parents. With the multitude of evidence which was presented to the trial court concerning the Respondent's basic character flaws of deceit and falsehood, the trial court was incredibly silent as to the effect that such character traits would have on the quality of care for the child. Neither did the trial court indicate what effect, if any, it considered the physical abuse problems between the parties had had, or would

have, upon the quality of care. That is not to imply that physical abuse between married persons is acceptable, tolerable or excusable. But the issue in a child custody case is the effect, if any, that such problems may have upon a child and it was incumbent upon the trial court to disclose its findings of fact in that regard. Equally silent from the trial court are findings as to the weight accorded to the home study reports and the parties' respective abilities to provide for the physical needs of the child.

Appellant reiterates what was argued in his initial brief (p. 14) that the trial transcript is substantially silent as to the trial court's findings of fact with regard to child custody, and that the court's ruling appears to be without any rational basis in fact and is arbitrary.

Respondent's brief (p. 6) cites the case of Dearden v. Dearden, Utah, 15 Utah 2d 105, 388 P.2d 231 (1964) as to the moral misconduct of a parent in a child custody case. As is quoted by Respondent:

"[T]he paramount consideration is the welfare of the child. The **critical question** for consideration is whether the conduct shown is of such a nature as to hazard her welfare and make it unwise that she be in her mother's custody." (Id. at 388 P.2d 231, emphasis added).

Implicit in the final sentence of the quotation is a gender-based preference for the mother--which attitude has been

denounced in Pusey. However, the **critical question** which should have been in the forefront of the mind of the trial judge in this case was the **welfare of the child** and whether the **conduct** of the parents was of such a nature as to **hazard** the child's welfare. Once again, the trial transcript is silent as to those particular matters and, accordingly, the trial ruling should not be allowed to stand.

The Respondent's brief aptly points out (p. 7-8) that:

"The trial court was faced with deciding whether to award the child to a confessed felon or one who physically had abused his present [wife] and past [wife]."

The trial court erred in not revealing the mental process by which it weighed such evidence in light of the best interests of the child.

As to the sufficiency of findings which should be included in a ruling of child custody by a trial court, the Dearden case is illustrative (Id. at 232) as is Nilson v. Nilson, Utah, 652 P.2d 1323.

With regard to Appellant's brief, Point IV, (p. 18), Respondent's brief (p. 8-9) contends that the evidence (psychological assessment by Dr. Reed Payne) was inadmissible because it was hearsay. Respondent's argument is entirely irrelevant for the reason that no hearsay objection was raised at

trial and the court failed to make any ruling at all with respect to the evidence.

POINT II - CHILD SUPPORT

Respondent's brief implies (p. 9) that in order for the trial court to make an order of child support in an amount different than the amount that had previously been ordered as temporary child support (i.e., \$140.00 per month), the circumstances of the parties would have had to have changed "from the time the Order was entered concerning the temporary support." (p. 9). If Respondent is contending what she has implied, she is mis-applying the law concerning changes of circumstances as grounds for modifying orders of support. A party against whom a temporary support obligation is ordered does not have the burden of establishing a change of circumstances before the trial court can enter a final support order that is different in amount. The facts which are relevant in making a determination of support are the needs of the child and the respective abilities of the mother and father to provide for those needs. Utah district courts routinely use child support schedules for guidance in making the determination. With respect to the child support schedule that was relevant in this case, Appellant refers the Court to his arguments in this regard at page 25 of his initial brief.

POINT III - \$3,000.00 DEBT

The Respondent's brief states (p. 10) that she testified that the debt was ultimately used for Christmas presents, traveling and miscellaneous household items, while she admitted to no less than five (5) criminal offenses involving dishonesty. At the same time, there was substantial contrary evidence that Respondent had used the money to get out of jail. Appellant testified as follows:

Q: Now, concerning the next [debt] you have listed here, an indebtedness to Aaron Hansen. Who is Aaron Hansen?

A: My father. This was for bail money to bail [Respondent] out of jail, \$3,000. It was for \$3,500 restitution that was paid for crimes for state charges.

Q: At that was all borrowed from your father?

A: Some was from my father and some was from my grandfather and two brothers.

Q: But it went through your father; is that right?

A: Yes. My father kind of --

Q: And that was done after the bankruptcy as well?

A: Yes.

Q: And that was done in connection with charges pending against [Respondent]; is that right?

A: Yes.

Q: Before you filed for your divorce?

A: Yes.

Q: Has any of that been paid to you or your father since then?

A: No.

Q: And you would ask that [Respondent] be responsible then for the paying of the money due to your father; is that correct?

A: Yes.

Q: \$6,500?

A: Yes.

(See Tr. at 19)

On cross-examination (Tr. at 41), Respondent's attorney questioned Appellant concerning checks evidencing the debt:

Q: All right, can you find those [checks] for me, then?

A: They are right there.

Q: Hand them to me, if you would. I show you Defendant's Exhibit 10, Mr. Hansen. Can you identify that item, please?

A: Yes. It's a check for \$420.00 from my brother, Chris Hansen, to Dennis Miller, my friend.

Q: And Defendant's Exhibit 11?

A: A check for \$300.00 from my mother, Leora Hansen, and also says 'Cynthia's Bail.' Also to Dennis [Miller].

Q: And Defendant's Exhibit 12?

A: Yes. A check for \$2,200.00 from my other brother, David Hansen, to Dennis Miller.

Q: And it's those items that make up the \$3,000.00 bail?

A: No. There was \$80.00 I think cash in addition to that.

The testimony regarding the checks and cash totalled \$3,000.00 and the Court received the exhibits into evidence. The evidence of the Appellant was more detailed and specific, and certainly more credible with respect to financial matters, than that of the Respondent. On no less than three (3) occasions, Respondent had committed felony crimes of dishonesty with respect to money transactions. On the other hand, Appellant presented the actual checks which were all made payable to one Dennis Miller and were not in any way connected with Christmas presents or miscellaneous household items as Respondent's testimony had suggested.

As is argued in Appellant's initial brief, the trial court did not make any findings with respect to the evidence on this issue and the ruling appears to be arbitrary and without any basis in fact. Accordingly, the ruling of the trial court should be reversed.

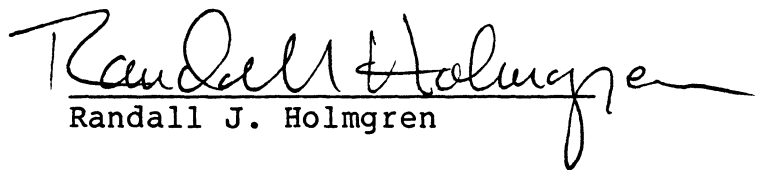
CONCLUSION

As Appellant has argued in his initial brief and in this reply brief, the District Court erred in that its ruling is seriously lacking with respect to findings of fact and appears to

be arbitrary and without any basis in fact. This case clearly mandates reversal and a new trial on the issues raised on appeal.

DATED this 22 day of January, 1987.

SHIELDS, SHIELDS & HOLMGREN

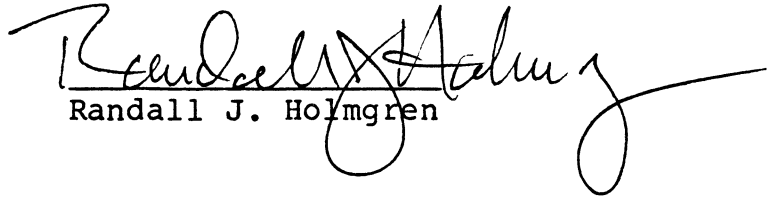

Randall J. Holmgren

CERTIFICATE OF MAILING

I hereby certify that I personally mailed four (4) true and correct copies of the foregoing REPLY BRIEF OF APPELLANT to the following, postage prepaid.

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DATE: January 22, 1987.


Randall J. Holmgren